

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: August 24, 2006

Resolution No. L-335

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION (CPSD) INVESTIGATION RECORDS PURSUANT TO SUBPOENA OF OREN & PABOOJIAN ON BEHALF OF EMILY DOBBS SEEKING DISCLOSURE OF COMMISSION RECORDS RELATING TO A JUNE 30, 2005 INCIDENT INVOLVING SIMON AND SIMON ENTERPRISES AND PACIFIC GAS & ELECTRIC COMPANY IN CLOVIS, CALIFORNIA

BACKGROUND

The law firm of Oren & Paboojian issued a subpoena for records of the California Public Utilities Commission (Commission) for “any and all copies of documents regarding the investigation pertaining to the subject incident which occurred on June 30, 2005, at 20128 Nicholas Road in Clovis, California, concerning the decedent, RYAN DOBBS.” Mr. Ryan Dobbs was electrocuted when a truck he was in contact with owned by Simon and Simon Enterprises made contact with PG&E’s electrical lines.

On July 1, 2006, Commission staff advised Oren & Paboojian that staff could not disclose the investigative records in the absence of authorization by the Commission. General Order (G.O.) 66-C, the Commission’s guideline for public access to Commission records, provides in § 1.1 that Commission records are public, except “as otherwise excluded by this General Order, statute, or other order, decision, or rule.” G.O. 66-C § 2.2 precludes staff’s disclosure of “[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.” Section 2.2 (a) covers information provided by PG&E employees to Commission staff in the course of staff’s investigation, as well as Commission-generated records containing this information.

Although G.O. 66-C § 2.2(a) requires staff to deny most initial requests seeking Commission investigation records and information, and to object to such subpoenas until the Commission has authorized disclosure, section 3.4 of the G.O. permits those denied

access to appeal to the Commission for disclosure. Subpoenas implicitly include such an appeal. This resolution constitutes the Commission's response to the subpoena served by Oren & Paboojian.

DISCUSSION

The Code of Civil Procedure provides broad discovery rights to those engaged in litigation. Unless limited by an order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code of Civil Procedure § 2017 (a).)

Evidence Code § 911 provides that: "Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness. (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing. (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object or other thing." Thus, as a general rule, where state evidence law applies, a government agency's justification for withholding information in response to a subpoena must be based upon a statutory prohibition, privilege, or other protection against disclosure.

There is no statute prohibiting disclosure of the Commission's incident investigation records. The potentially applicable statutory restrictions on disclosure applicable here relate to "official information" obtained in confidence by a public employee in the course of his duties that has not been open or officially disclosed to the public (Evidence Code § 1040 (a)) and "personal information" pursuant to the Information Practices Act (IPA) (Civil Code § 1798, et seq.).

Official Information

The records include employee information from Simon and Simon Enterprises and PG&E, including information provided by PG&E employees related to the incident. Because there is no statute prohibiting disclosure of the Commission's incident investigation records, the official information privilege is not absolute, and the Commission has discretion whether to exercise the privilege. (Evidence Code § 1040 (b).) During the past twelve years, the Commission has ordered disclosure of records and information concerning completed incident investigations on numerous occasions. The Commission has found that such disclosure will not interfere with the Commission's investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the incident.¹

¹ See, e.g. Commission Resolution L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.93-05-020 (1993), 49 CPUC 2d 241.

Viewing the current subpoena for records within the context of these laws and policies, we note that Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records will not interfere with staff's ability to complete its incident investigation responsibilities.

Personal Information

The IPA is generally intended to restrict disclosure of information that it is not otherwise public that is obtained from "personal information" maintained in the records of a state agency, and prohibits disclosure of "personal information in a manner that would link the information to the individual to whom it pertains." (Civil Code §§ 1798.24.) The IPA defines "personal information" as:

any information that is maintained by an agency that identifies or describes an individual, including but not limited to, his or her name, social security number, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual. (Civil Code § 1798.3(a).)

The only "personal information" in the records subpoenaed here consists of references to Herb Simon of Simon and Simon Enterprises, the names of Commission staff and PG&E employees, statements attributed to Herb Simon and PG&E employees, and PG&E employee records. Most of this information is not restricted from disclosure because: (1) it is otherwise public; (2) it does not link the individual with other "personal information" in the records; or (3) by service of this resolution, the Commission made a reasonable attempt pursuant to Civil Code § 1798.24(k) to provide notice that "personal information" will be disclosed.

Testimony of Commission Employees

We strongly discourage litigants from seeking the testimony of Commission employees regarding incident investigations. The provision of such testimony at depositions or trials often greatly interferes with staff's vital work conducting safety inspections and incident investigations, and thus with the Commission's efficient implementation of its regulatory responsibilities, since staff must adjust normal workload to accommodate the often changing schedule of a subpoenaed appearance. Further, litigants frequently inappropriately seek staff testimony regarding legal issues and Commission policy determinations beyond the scope of their knowledge or authority.

COMMENTS ON DRAFT RESOLUTION

Public Utilities Code § 311 (g)(1) generally requires that proposed resolutions be served on all parties and subject to at least 30 days public review and comment before the

Commission may vote on them. Section 311 (g)(3) and Rule 77.7(f)(7) of the Commission's Rules of Practice and Procedure provide that the Commission may reduce or waive the period for public review and comment regarding decisions authorizing disclosure of documents in the Commission's possession when such disclosure is pursuant to subpoena. The comment period could be waived under this authority. However, in the absence of a Commission meeting date prior to August 24, 2006, the standard comment period will be provided.

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on July 25, 2006, in accordance with Public Utilities Code § 311(g). No comments were received.

FINDINGS OF FACT

1. The Commission received a subpoena from Oren & Paboojian, a law firm, on behalf of plaintiff Emily Dobbs seeking Commission files concerning an incident that occurred in Clovis, California, involving Simon and Simon Enterprises and PG&E. CPSD's file includes the Commission's investigation of an incident on June 30, 2005, involving the death of Ryan Dobbs, who was electrocuted after making contact with PG&E's electrical lines.
2. Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records and information will not interfere with staff's ability to complete its incident investigation responsibilities.
3. The subpoenaed records include "personal information" in the form of references to the names of individuals, including Commission staff involved in reporting and investigating the incident, the identities of Herb Simon of Simon and Simon Enterprises and PG&E employees, and their statements related to the incident.
4. The draft resolution was served on Oren & Paboojian, the counsel for decedent's wife plaintiff Emily Dobbs, and on PG&E.
5. The public interest favors disclosure of the requested investigation records.

CONCLUSIONS OF LAW

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon a statutory prohibition, privilege, or other protection against disclosure. (Evidence Code § 911.)
2. The Commission has, through G.O. 66-C § 2.2(a), limited staff disclosure of investigation records and information in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. G.O. 66-C does not limit the Commission's ability to order disclosure of records and information.
3. The public interest in nondisclosure of records concerning the June 30, 2006 incident in Clovis, California does not outweigh the necessity for disclosure in the interest of justice.
4. The subpoenaed records include "personal information" protected by the Information Practices Act (IPA). (Civil Code § 1798, et seq.)
5. The service of this resolution provides notice that the records include "personal information" related to employees of Simon and Simon Enterprises and PG&E and constitutes a reasonable attempt to provide notice pursuant to Civil Code § 1798.24(k).
6. The names of Commission staff, other government employees, Herb Simon and employees of Simon and Simon Enterprises, if any, and PG&E are not "personal information" restricted from disclosure by the IPA if the information is otherwise public information or does not link the individual to any other "personal information" pertaining to that individual in the records.

ORDER

1. Subject to the redaction of "personal information" of persons other than Herb and employees of Simon of Simon and Simon Enterprises, if any, and PG&E employees that (1) is not public information; or (2) links the individual to any other "personal information" pertaining to that individual in the records, the Commission's records concerning an incident that occurred on June 30, 2006 in Clovis, California, and the investigation of that incident, shall be disclosed in response to the subpoena served by Oren & Paboojian.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of August 24, 2006, and that the following Commissioners approved it:

STEVE LARSON
Executive Director

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners